

# Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete

## I. INTRODUCTION

With increasingly larger television contracts, rising ticket prices, and rapid expansion of university athletic budgets, intercollegiate athletics has become "big business."<sup>1</sup> As this "business" has boomed, the relationship between the student-athlete<sup>2</sup> and the university has changed. Athletic scholarship awards require student-athletes to perform services for the university,<sup>3</sup> a requirement that distinguishes them from other students and places them in a unique and increasingly significant relationship with the university. Today's student-athletes generate interest in their universities, media attention, and revenue, while as standard bearers, they are expected to uphold the integrity of their sponsoring institutions in competition.<sup>4</sup> Yet, despite the obligations and responsibilities imposed on student-athletes by their respective universities and

---

<sup>1</sup> See Steve Turcotte, *Washington Profits Due to Football*, USA TODAY, Oct. 14, 1991, at 10C (University of Washington Athletic Department official stating that "College sports have become big business . . . . In this day, you have to treat it like a business, because that's almost what it is."); Steve Wieberg & Tom Witosky, *Michigan and UCLA Struggle*, USA TODAY, Oct. 14, 1991, at 10C (University of Michigan Athletic Department's total operational expenditures have risen from \$12.06 million in 1985 to nearly \$22 million in 1991); James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 14 (1985) (In 1984, the last year the NCAA controlled the television rights to its own championship tournaments, the NCAA earned over \$31 million from selling the rights to televise the NCAA men's Division I basketball championship. Prior to 1984, the NCAA and its member institutions shared over \$65 million per year from television contracts for college football.).

<sup>2</sup> The term "student-athlete" will be used throughout this Note to refer to college students whose tuition and required institutional expenses are funded by a full grant-in-aid (athletic scholarship). This Note will examine the legal implications of athletic scholarship agreements for student-athletes, especially those participating in the two major revenue-producing sports of football and basketball.

<sup>3</sup> Current NCAA rules permit educational institutions to terminate scholarship benefits during the term of the award should student-athletes cease to participate in their sports for reasons other than serious injury. See NCAA BYLAWS §§ 15.3.3, 15.3.4 (1991-92); see also *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App.), cert. denied, 192 S.E.2d 197 (1972); *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973).

<sup>4</sup> Derek Q. Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 105 (1985).

the National Collegiate Athletic Association (NCAA),<sup>5</sup> courts have been reluctant to grant student-athletes significant legal remedies and protections to equalize the bargaining power of the parties in athletic scholarship agreements.

In the 1983 case of *Rensing v. Indiana State Board of Trustees*,<sup>6</sup> the Supreme Court of Indiana addressed the issue of whether a student-athlete who sustained permanent injury in a football practice qualified as a university employee entitled to benefits under the state Worker's Compensation Act.<sup>7</sup> It vacated the decision of the Indiana Court of Appeals<sup>8</sup> and denied the student-athlete benefits, citing the absence of an employee-employer relationship between the student-athlete and the university.<sup>9</sup> The *Rensing* court based its decision in part on the belief that athletic scholarships are educational grants that primarily benefit students by allowing them to pursue advanced educational opportunities.<sup>10</sup> Though the *Rensing* decision is now a decade old, it illustrates well the broad range of legal issues currently associated with athletic scholarships. It discloses both the inconsistencies and the imbalance of bargaining power characterizing today's scholarship agreements, and it reveals the need for reform to avoid future litigation.

This Note examines the reasoning in *Rensing* and expands upon the issues raised in that case in an effort to reveal the complicated legal obligations in athletic scholarship agreements. In addition, this Note discusses several issues which, though not specifically addressed in *Rensing*, deserve attention in light of contemporary practices in intercollegiate athletics. Part II discusses the contractual nature of athletic scholarships and differs with the *Rensing* court's determination that there was no employment contract between *Rensing*, the student-athlete, and Indiana State University. Part III explores the Indiana Supreme Court's failure to discuss the issues of implied contracts and the potential liability of universities that actively recruit athletes to participate in their athletic programs. Part IV examines the *Rensing* court's analysis and its application of section 117 of the Internal Revenue Code. This Note demonstrates how the NCAA bylaws governing athletic scholarship agreements and the present "big business" environment of intercollegiate athletics satisfy the two judicial tests most frequently used to determine whether scholarship benefits should be included in gross income. In doing so, this Note examines

---

<sup>5</sup> The NCAA is the primary governing body of intercollegiate athletics. The Association includes approximately 175 organizations and conferences and some 800 member universities. See Koch, *supra* note 1, at 11-12.

<sup>6</sup> 444 N.E.2d 1170 (Ind. 1983).

<sup>7</sup> See IND. CODE ANN. § 22-3-1-1 (Burns 1991).

<sup>8</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78 (Ind. Ct. App. 1982).

<sup>9</sup> *Rensing*, 444 N.E.2d at 1174.

<sup>10</sup> *Id.*

of section 117. Part V argues that due process protection should be extended to student-athletes whose scholarships are not renewed by their universities. Finally, while discussing the difficulties of establishing an employee-employer relationship between the student-athlete and the university, Part VI concludes this Note by proposing amendments to the NCAA bylaws governing athletic scholarships.

## II. ATHLETIC SCHOLARSHIPS AS EXPRESS CONTRACTS

### A. Overview

While the *Rensing* court found no employment contract between the student-athlete and the university,<sup>11</sup> courts have recognized that an athletic scholarship agreement imposes contractual obligations on both parties. *Taylor v. Wake Forest University*<sup>12</sup> was the first major court decision to hold that a contract right exists between the student-athlete and the university. In *Taylor*, a football player at Wake Forest University sought to recover the cost of funding his education when his athletic scholarship was terminated for refusal to participate in team practices. The player, Taylor, had suffered poor grades in his first semester and despite significant grade improvement exceeding the minimum University participation requirements, had refused to participate in daily football practices. The University terminated Taylor's scholarship, citing the player's failure to comply with his contractual obligations under the scholarship agreement.<sup>13</sup> The court ruled in favor of the University, finding that the scholarship agreement created contractual obligations requiring Taylor to maintain academic as well as athletic eligibility.<sup>14</sup> These requirements included participation in practice sessions. Taylor's failure to meet this obligation, held the court, justified the University's termination of scholarship benefits.

Shortly after *Taylor* was decided, a federal court reaffirmed the belief that an athletic scholarship created a contractual relationship between the student-athlete and the university. In *Begley v. Corporation of Mercer University*,<sup>15</sup> Begley, a student-athlete, brought a breach of contract claim against Mercer University for revoking his scholarship when it discovered that his high school grades did not satisfy the NCAA minimum requirements. The court granted the University summary judgment, stating that Begley's grades violated a provision

---

<sup>11</sup> *Id.* at 1175.

<sup>12</sup> 191 S.E.2d 379 (N.C. Ct. App. 1972).

<sup>13</sup> *Id.* at 381.

<sup>14</sup> *Id.* at 382.

<sup>15</sup> 367 F. Supp. 908 (E.D. Tenn. 1973).

in the scholarship agreement requiring him to meet and abide by all NCAA rules and regulations. More importantly, the court placed particular significance on the intentions of the two parties, concluding that under an athletic scholarship agreement the university provides the student-athlete with monetary aid for the completion of an undergraduate degree in exchange for participation in the university's athletic program.<sup>16</sup>

The *Taylor* and *Begley* decisions lend support for the proposition that an athletic scholarship creates an employee-employer relationship between the student-athlete and the university. Yet prior to *Taylor* and *Begley*, courts limited the finding of employer-employee relationships to cases in which student-athletes were provided campus jobs contingent on their continued participation in the school's athletic program.<sup>17</sup> The *Rensing* case marked one of the first times in which a court considered whether an athletic scholarship agreement alone was sufficient to create an employment contract.<sup>18</sup>

### B. NCAA Constitution and Bylaws: Form over Substance

The *Rensing* court focused on those provisions of the NCAA Constitution and bylaws incorporated into Rensing's scholarship agreement.<sup>19</sup> These provisions played a significant role in helping the court reach its decision that there was no employment contract between Rensing and Indiana State University. The court acknowledged that one of the basic principles governing intercollegiate athletics is the concept of "amateurism," which holds that participation in intercollegiate athletics is an avocation and that there is a clear

---

<sup>16</sup> The *Begley* court stated: "It was the obvious intention of Mercer to extend monetary aid in the stipulated amount to Mr. Begley for his use in working toward the completion of an undergraduate degree in exchange for his participation in its basketball program. . . ." *Id.* at 909-10.

<sup>17</sup> See *Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169 (Dist. Ct. App. 1963); *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

NCAA rules usually prohibit a student-athlete on full scholarship to be employed during the term or semester because the university must include the student-athlete's employment earnings towards the full grant-in-aid limit set by the NCAA. NCAA BYLAWS §§ 15.1, 15.2.6 (1991-92).

<sup>18</sup> Athletic scholarships at Division I schools require the athlete to sign a National Letter of Intent which contractually restricts the athlete from attending another university. The educational grant received by the athlete is limited to a one-year term with no guarantee of annual renewal. In addition, the university may cancel the award during the period if a student voluntarily withdraws from the team. See Adam Hoefflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 594-95.

<sup>19</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

demarcation between college and professional sports.<sup>20</sup> The court further asserted that it is a fundamental tenet of NCAA policies that intercollegiate sports are only to be maintained as a portion of the educational program and that student-athletes are an integral part of the student body.<sup>21</sup> The court concluded by stating that an athlete receiving financial aid is not compensated to participate in a sport, but rather is to be "first and foremost a student."<sup>22</sup> Although the court's analysis conforms to an idealized conception of intercollegiate athletics held by the NCAA and its members, its reasoning appears inappropriate in light of contemporary practices in intercollegiate athletics. The principles behind NCAA policies are reflected in form, not substance, when juxtaposed against the demands placed on student-athletes competing in the "big business" environment of intercollegiate athletics.<sup>23</sup>

The *Rensing* court also based its decision on the NCAA's strict rules against student-athletes receiving pay.<sup>24</sup> The court argued that, because the NCAA rules against receiving pay were incorporated into the financial agreement, the claim that the agreement established an employee-employer relationship had no basis.<sup>25</sup> One commentator, however, has criticized the

---

<sup>20</sup> *Id.* See also NCAA CONST. § 2.6 (1991-92). "The Principle of Amateurism" states: "Student-athletes shall be amateurs in an intercollegiate sport. . . . Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.*

<sup>21</sup> *Rensing*, 444 N.E.2d at 1173. It is difficult to accept this line of reasoning when today's student-athletes receive much different treatment from the university than the rest of the general student body. See Edward G. Lawry, *Conflicting Interests Make Reform of College Sports Impossible*, CHRON. HIGHER EDUC., May 1, 1991, at A44. Lawry claims that student-athletes are not representative of the student body. He argues that student-athletes have special tutors; they frequently live in separate dorms, eat different food, and follow enrollment procedures not provided to other students. *Id.*

<sup>22</sup> *Rensing*, 444 N.E.2d at 1173.

<sup>23</sup> A federal district court in Minnesota appeared to discredit the lofty ideals and principles governing college athletics when it examined the student-athlete's position within the current environment of intercollegiate sports:

This court is not saying that athletes are incapable of scholarship; however they are given little incentive to be scholars and few persons care how the student athlete performs academically . . . . It well may be true that a good academic program for the athlete is made virtually impossible by the demands of their [sic] sport at the college level. If this situation causes harm to the University, it is because they [sic] have fostered it and the institution rather than the individual should suffer the consequence.

Hall v. University of Minn., 530 F. Supp. 104, 109 (D. Minn. 1982).

<sup>24</sup> *Rensing*, 444 N.E.2d at 1173. If student-athletes receive pay they may lose their amateur status and the opportunity to compete in intercollegiate athletics.

<sup>25</sup> *Id.*

court for emphasizing select portions of the NCAA Constitution and bylaws to support its conclusion.<sup>26</sup> A close examination of the 1982-83 NCAA Constitution reveals that while educational grants received by athletes in exchange for their athletic participation were acknowledged to be a form of "pay," they were considered an *exception* to the rule against compensation.<sup>27</sup> The NCAA has since amended the language of this provision to exclude mention of the receipt of scholarship funds in its discussion of compensation.<sup>28</sup>

Perhaps the strongest argument against the position that athletic scholarships are not to be considered "pay" comes from the recent Knight Commission report.<sup>29</sup> In rejecting the idea of paying college athletes to participate in intercollegiate athletics, the Knight Commission stated that "[s]cholarship athletes are already *paid* in the most meaningful way possible: with a free education."<sup>30</sup> While the Knight Commission report does not view students participating in college sports as professional athletes, it does seem to concede, though perhaps not intentionally, that athletic scholarships are a form of compensation. This recognition undermines the *Rensing* court's argument.

In rejecting the claim that an employment contract existed between *Rensing* and the University, the court argued that NCAA regulations conflict with the proposition that a student-athlete receives a scholarship in return for the services provided the university by participating in a varsity sport.<sup>31</sup> The court argued that pursuant to the NCAA Constitution, "the institution cannot, in any

---

<sup>26</sup> Robert C. Rafferty, Note, *Rensing v. Indiana State University Board of Trustees: The Status of College Scholarship Athlete-Employee or Student?*, 13 CAP. U.L. REV. 87, 98 (1985).

<sup>27</sup> *Id.* The 1982-83 NCAA Constitution stated:

(a) An individual shall not be eligible for participation in an intercollegiate sport if the individual:

...

(3) Has directly or indirectly used athletic skill for pay in any form in that sport; however, a student athlete *may accept or have accepted scholarships or educational grants-in-aid* administered by an educational institution which do not conflict with the governing legislation of this Association.

*Id.* at 98-99 (quoting NCAA CONST. § 3-1(a)-(3) (1982-83)) (emphasis added).

<sup>28</sup> See NCAA BYLAWS § 12.1.2 (1991-92).

<sup>29</sup> *Keeping Faith with the Student-Athlete: A New Model For Intercollegiate Athletics*, KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS 11 (1991). The Knight Commission is a private foundation formed for the purpose of studying intercollegiate athletics and offering proposals for reform.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> See Rafferty, *supra* note 26, at 99.

way, condition financial aid on a student's ability as an athlete."<sup>32</sup> However, the court referred only to a small section of the appropriate NCAA regulation. The court failed to address the language of the provision that reads: "[i]nstitutional aid may not be gradated or canceled *during the period* of its award (i) on the basis of a student-athlete's ability or his contribution to a team's success."<sup>33</sup> As one commentator has argued, "during the period" only prohibits the educational institution from terminating the scholarship based on athletic ability during the term of the award.<sup>34</sup> After the one-year term has expired, the NCAA does not explicitly prevent the institution from using athletic ability as a factor in its decision to renew or deny scholarship benefits.<sup>35</sup>

### C. Problems with a One-Year Scholarship Term

In considering the *Rensing* court's position that college athletes are "first and foremost students," it is particularly troubling that athletic scholarships are limited to one year.<sup>36</sup> The one-year athletic scholarships currently offered by Division I schools seem to contradict the *Rensing* court's assertion. A one-year term potentially allows more pressure, both subtle and overt, to be exerted on student-athletes to improve athletic, rather than academic, performance to ensure renewal of scholarship benefits.

A comparison of the flexibility enjoyed by the university and the student-athlete reveals a significant imbalance. Under the current system, the university enjoys full protection because its contractual obligation to educate its student-athletes is not permitted to exceed one academic year.<sup>37</sup> Conversely, student-athletes have little flexibility under the agreement because harsh penalties are enforced if they decide to transfer to another university.<sup>38</sup> Upon signing a National Letter of Intent while in high school, student-athletes are required to attend the named institution for the upcoming academic year or forego participation in athletics at another university until two full academic years have been completed in residence at the latter institution.<sup>39</sup> If, after completing their first year, student-athletes decide to transfer to another university, they are

---

<sup>32</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

<sup>33</sup> Rafferty, *supra* note 26, at 99 (quoting NCAA CONST. § 3-4(c)-(1) (1982-83)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See NCAA BYLAWS § 15.3.3.1 (1991-92).

<sup>37</sup> *Id.*

<sup>38</sup> See NCAA BYLAWS 14.6.1 (1991-92).

<sup>39</sup> COLLEGIATE COMMISSIONERS ASSOCIATION, NATIONAL LETTER OF INTENT, § 2 (1990-91).

generally not permitted to participate in intercollegiate athletics for one full year.<sup>40</sup>

The one-year scholarship agreement is also subject to abuse by coaches, who might threaten nonrenewal of scholarship benefits if a student-athlete's athletic performance does not improve. While some universities have rules that prohibit scholarship renewal determinations based on athletic performance, these rules may rely on vague language that does not entirely eliminate the possibility that scholarship renewals will be denied, in part or in whole, on the basis of athletic ability.<sup>41</sup>

Finally, NCAA bylaws do not even ensure automatic renewal of a student-athlete's scholarship benefits in the event that "the recipient sustains an injury that prevents him or her from competing in intercollegiate athletics . . . ."<sup>42</sup> The tenuousness caused by the one-year term limitation on athletic scholarships supports the assertion that such agreements are *quid pro quo* arrangements and not simply educational grants-in-aid.

### III. UNIVERSITY LIABILITY UNDER IMPLIED CONTRACT THEORY

In reaching its decision, the *Rensing* court purported to consider the existence of a contract of employment, either expressed or *implied*.<sup>43</sup> The existence of an implied contract may not only prove significant in determining whether an employee-employer relationship exists between the student-athlete and the university, but it also may expose the university to other legal obligations.

In *Rensing*, the court rejected the existence of an express employment contract but failed to analyze the potential existence of an implied contract.<sup>44</sup>

---

<sup>40</sup> See NCAA BYLAWS, *supra* note 38.

<sup>41</sup> See, e.g., OHIO STATE UNIVERSITY DEPARTMENT OF INTERCOLLEGIATE ATHLETICS, POLICIES AND PROCEDURES FOR THE OSU STUDENT-ATHLETE 16 (1991-92). The Ohio State University establishes scholarship renewal policies pursuant to the provisions of the Big Ten Conference's Tender of Financial Aid. The Ohio State University renewal policy states: "(3) Relative lack of the [sic] athletic ability . . . will *not* result in denied renewal of grant-in-aid." *Id.* It is unclear why the University chose to use the words "relative lack" of athletic ability instead of incorporating explicit language that would prohibit nonrenewal based on any assessment of athletic ability or performance.

<sup>42</sup> NCAA BYLAWS § 15.3.3.1.2 (1991-92). It is important to note that research for this Note failed to discover any claims by injured student-athletes whose scholarships had been denied renewal on the basis of an inability to physically participate in the school's athletic program.

<sup>43</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

<sup>44</sup> Implied contracts are of two kinds. An "implied-in-fact" contract is one in which the existence of an agreement is inferred from conduct evidencing contractual intent. See



While courts have held that student residence hall and cafeteria assistants are not university employees,<sup>45</sup> the *Rensing* case can be distinguished given the promises made during recruiting, the control exercised by the university and its coaches over the student-athlete's daily activities, the extent of participation required, and the profit gained by the university from intercollegiate athletics.<sup>46</sup> In light of these facts, a strong argument can be made that, despite the absence of a formal employment contract, there exists an implied contract between the student-athlete and the university.

Beyond the employment contract itself, both the awarding of athletic scholarships and the active recruitment of student-athletes<sup>47</sup> can expose the university to other suits based on an implied contract theory. Although outside the setting of university athletics, *Lowenthal v. Vanderbilt University*<sup>48</sup> provides precedent to be applied to cases involving intercollegiate athletic programs. In *Lowenthal*, a Tennessee court found that a contractual relationship existed between students and their university which imposed liability on the university for failure to provide a group of graduate students with a quality management program as had been promised.<sup>49</sup> The decision in *Lowenthal* emphasizes at least one court's belief that a university is legally responsible for providing its students with the programs that induced their attendance.

At present, an implied contract theory is being used by members of the Yale University wrestling team. The wrestlers filed suit against the university claiming that it breached an implied contract when it canceled funding for their sport in the spring of 1990.<sup>50</sup> Ivy League institutions do not award athletic scholarships and may only award financial aid to student-athletes who

---

SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 3 (3d ed. 1957). To prevent unjust enrichment, a contract implied in law (also known as a quasi-contract) may be found by a court even when no party has made any promise. The existence of a quasi-contract does not depend on the apparent intention of the parties. See BLACK'S LAW DICTIONARY 1245 (6th ed. 1990).

<sup>45</sup> See, e.g., *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324 (10th Cir. 1981); *Bobilin v. Board of Educ.*, 403 F. Supp. 1095 (D. Haw. 1975).

<sup>46</sup> See Hoeflich, *supra* note 18, at 599.

<sup>47</sup> While some educational institutions, such as the members of the Ivy League, do not offer athletic scholarships, these schools, nevertheless, actively recruit student-athletes to participate in their athletic programs. See source cited *infra* note 50.

<sup>48</sup> See Johnson, *supra* note 4, at 109 (discussing *Lowenthal v. Vanderbilt*, No. A 8525 (Tenn. Ch. Ct., Davidson County, 1977)).

<sup>49</sup> *Id.* In *Lowenthal*, a group of students brought suit under an implied contract theory for the failure of a graduate management program offered by the University. The program promised high quality academic and practical training leading to careers in management. The students filed their claim when internal problems led the University to stop accepting new students into the program. The court ruled in favor of the students and awarded damages.

<sup>50</sup> *Disgruntled Members of the Yale University Wrestling Team have Sued the Institution*, CHRON. HIGHER EDUC., Dec. 4, 1991, at A49.

demonstrate financial need.<sup>51</sup> The wrestlers argued, however, that Yale breached an implied contract that arose when it recruited them to participate in the school's wrestling program.<sup>52</sup> It is important to recognize that many institutions that do not offer scholarships, such as Yale, still actively recruit student-athletes. Under such circumstances, it is understandable that promises made by coaches during the recruitment of student-athletes may play a significant factor in the decision whether to attend a particular institution. As a result, a convincing argument can be made in favor of the wrestlers' position despite the absence of an express contract.

The resolution of the Yale case may have a significant legal impact on Division I institutions that contemplate canceling their athletic programs. Furthermore, it is apparent that student-athletes who receive athletic scholarships must be provided some legal protection based on their contractual relationship with the university. According to Derek Johnson, under the present terms of an athletic scholarship, the student-athlete is "forced to rely on the good faith of the university to perform its part of the bargain without a known avenue of recourse should a breach occur."<sup>53</sup> Supported by NCAA rules and regulations that favor the awarding institution, the university holds the superior bargaining position in athletic scholarship agreements. Application of contract law could address some of the existing inequities.

#### IV. SECTION 117 OF THE INTERNAL REVENUE CODE

##### A. *The Rensing Court's Discussion of Party Intent*

In determining whether an employment contract existed between the student-athlete and the university, the *Rensing* court stressed the importance of examining the intent of the parties to enter into an employment relationship.<sup>54</sup> The court, however, conducted a cursory analysis of the issue by applying a limited definition of "pay" and relying on the provision of section 117 of the Internal Revenue Code.<sup>55</sup> The court concluded that both parties lacked the intent to enter into an employment contract.<sup>56</sup>

In assessing the university's intent the *Rensing* court relied on the argument that the athletic scholarship awarded was not considered "pay" by both the

---

<sup>51</sup> A. Bartlett Giamatti, *Yale and Athletics: A Sense of Proportion*, YALE ALUMNI MAG., May 1980, at 13.

<sup>52</sup> *Id.*

<sup>53</sup> Johnson, *supra* note 4, at 111.

<sup>54</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1175.

university and the NCAA, pursuant to its Constitution and bylaws.<sup>57</sup> However, the university did provide Rensing with scholarship benefits valued at \$2,374 annually and the financial aid agreement required Rensing to render services beyond athletic participation to the athletic department.<sup>58</sup> Such an arrangement provides strong evidence that the athletic scholarship agreement actually created a *quid pro quo*.<sup>59</sup>

The court's discussion of Rensing's intent focused on his failure to include his scholarship benefits as gross income for tax purposes.<sup>60</sup> This argument, however, is unpersuasive. Pursuant to section 117 of the Internal Revenue Code, Rensing was not required to include the scholarship benefits as a portion of gross income.<sup>61</sup> Rensing's intent cannot be measured by his failure to treat scholarship benefits as compensation for income tax purposes. Rather, it is likely that his decision to exclude the benefits from gross income was made on the basis that the tax code permitted it.

### B. *The Inclusion of Athletic Scholarship Benefits in Gross Income*

Despite the problems with the *Rensing* court's reliance on section 117 to prove intent, further examination of other courts' treatment of this section suggests that athletic scholarship benefits should not be excluded from gross income. The courts most frequently apply one of two tests, the primary purpose test or the *quid pro quo* test, to determine whether scholarship grants can be excluded from gross income.<sup>62</sup> "The primary purpose test focuses on the relationship between the grantor and the grantee."<sup>63</sup> If the court finds that the grantor gave the award largely for the grantor's own benefit, then the grantee may not exclude the amount of the award from gross income.<sup>64</sup>

---

<sup>57</sup> As stated above, the 1982-83 NCAA Constitution recognizes scholarships as a form of compensation. See *supra* note 27 and accompanying text.

<sup>58</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 80 (Ind. Ct. App. 1982). The financial aid agreement between Indiana State University and Rensing required him to remain eligible for competition and, if injured, to assist in other tasks associated with the conduct of the athletic program within the limits of his physical capabilities. *Id.*

<sup>59</sup> Rafferty, *supra* note 26, at 100.

<sup>60</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

<sup>61</sup> I.R.C. § 117 (1988). In cases involving athletic scholarship benefits, the courts applied section 117(a)(1) which stated that "[g]ross income does include any amount received as a qualified scholarship . . . at an educational organization." *Id.*

<sup>62</sup> See Hoeflich, *supra* note 18, at 588-91.

<sup>63</sup> *Id.* at 588.

<sup>64</sup> *Id.*

However, if the award primarily benefits the grantee, then the grantee may exclude it pursuant to section 117.<sup>65</sup>

Since 1970, courts have generally applied the *quid pro quo* test.<sup>66</sup> In *Bingler v. Johnson*,<sup>67</sup> the United States Supreme Court relied on the *quid pro quo* test in upholding the validity of section 1.117-4(c)(1) of the Treasury Regulations.<sup>68</sup> The Court stated: "The thrust of the provision dealing with the compensation is that bargained-for payments, given only as a 'quo' in return for the 'quid' of services rendered—whether past, present, or future—should not be excludable from income as 'scholarship' funds."<sup>69</sup>

Upon examining the current one-year athletic scholarship, courts using either test could find that student-athletes should not be permitted to exclude scholarship benefits under section 117. Applying the primary purpose test, the benefits accruing to the educational institution seem substantially to outweigh the benefits received by the student-athlete. Adam Hoeflich notes that the university views the student-athlete who participates in major college sports as a "profit-making asset": "[T]he athlete's play increases attendance, bolsters student morale, augments the school's reputation, [and] heightens alumni awareness and support. . . ."<sup>70</sup> While the student-athlete certainly receives benefits from an athletic scholarship, it is difficult to argue that the primary focus of the relationship between the student-athlete and the university is the education of the athlete. A recent study of student-athletes entering Division I institutions in 1983 and 1984 found that football and basketball players graduated at a rate significantly below the rate of graduation for the general student body.<sup>71</sup> It appears that, given the present realities of intercollegiate

---

<sup>65</sup> See, e.g., *Hembree v. United States*, 464 F.2d 1262, 1264 (4th Cir. 1972).

<sup>66</sup> Hoeflich, *supra* note 18, at 588.

<sup>67</sup> 394 U.S. 741 (1969). Respondents held positions at a laboratory operated by the Westinghouse Electric Corporation and participated in a two-phase fellowship program. The first phase entailed a work-study arrangement in which employees held regular jobs while attending classes on a part-time basis. Tuition and expenses associated with attending classes were paid for by the company. The second phase granted participating employees an educational leave of absence enabling them to work on their dissertations full-time while receiving 70% to 90% of their prior salaries. Respondents filed refund claims for the federal income tax withheld by Westinghouse for the amounts paid to them while on educational leave. The Supreme Court held that Treasury Regulation § 1.117-4(c), promulgated under section 117 of the Internal Revenue Code, is valid and that amounts received as scholarships are not excludable if primarily for the benefit of the grantor. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 757-58.

<sup>70</sup> Hoeflich, *supra* note 18, at 599.

<sup>71</sup> Steve Wieberg, *Study Reveals Nagging Problems*, USA TODAY, July 6, 1992, at 8C. The NCAA study revealed that 38% of basketball players and 45% of football players graduated within six years of enrollment as compared to the general student body rate of 52% over the same period.

sports, athletic scholarship benefits should not be excluded from gross income under the primary purpose test.

Under the *quid pro quo* test, if a student is required to "perform services, then that student may not exclude the scholarship from gross income.<sup>72</sup> The NCAA requires that athletic scholarships be awarded on an annual basis.<sup>73</sup> To receive full benefits over the term of the scholarship, the recipients must render themselves academically eligible, must not "fraudulently misrepresent any information on an application, letter of intent or financial aid agreement, must not engage in serious misconduct warranting substantial disciplinary penalty, and must continue to participate in the athletic program.<sup>74</sup> Failure to meet any of these requirements is considered a breach of the scholarship agreement<sup>75</sup> and permits the university to cancel scholarship benefits during the one-year period.<sup>76</sup> Under the current system, athletic scholarships create a *quid pro quo* relationship because the student is required to perform services for the university. In addition, this relationship places power in the hands of the university which, in certain circumstances, may cancel scholarship benefits during the term of the award.<sup>77</sup>

### C. Revenue Ruling 77-263

While discussing section 117, the *Rensing* court referred to Revenue Ruling 77-263,<sup>78</sup> which specifically states that recipients of athletic scholarships are not to be taxed on scholarship proceeds. Yet, the hypothetical circumstances set forth in the Revenue Ruling 77-263 are out of step with today's "big business" environment in intercollegiate athletics. Revenue Ruling 77-263 hypothesizes an athletic scholarship award with three principal features:

---

<sup>72</sup> Hoeflich, *supra* note 18, at 602.

<sup>73</sup> NCAA BYLAWS § 15.3.3.1 (1991-92).

<sup>74</sup> NCAA BYLAWS § 15.3.4.1 (1991-92).

<sup>75</sup> See *Taylor v. Wake Forest Univ.*, 191 S.E. 2d 379 (N.C. Ct. App.), *cert. denied*, 192 S.E.2d 197 (N.C. 1972).

<sup>76</sup> NCAA BYLAWS § 15.3.4.1 (1991-92). It is important to note that in the case of a student-athlete who voluntarily withdraws from a team for personal reasons, the university must wait until the end of the quarter or semester to cancel further scholarship benefits. *Id.*

<sup>77</sup> The NCAA rules only prevent a university from terminating a student-athlete's scholarship benefits during the award term on the basis of injury or athletic ability. NCAA BYLAWS § 15.3.4.2 (1991-92). But see Hoeflich, *supra* note 18, at 602. Hoeflich contends that the one-year scholarship does not impose any requirements on the students. If a student-athlete does not participate, Hoeflich asserts that the scholarship is not taken away, but rather renewal is not granted at the end of the scholarship term. This argument, however, fails to consider the wide scope of power that a university has to terminate a student-athlete's scholarship during the term pursuant to NCAA BYLAWS section 15.3.4.1.

<sup>78</sup> Rev. Rul. 77-263, 1977-2 C.B. 47.

(i) The awarding institution expects, but does not require, student participation in the student's sport; (ii) The awarding institution cannot terminate the benefits in the event of an injury or in the case of the student's unilateral decision to withdraw; and (iii) There are no additionally imposed requirements in lieu of participation in the sports program.<sup>79</sup> On the basis of these facts and the *quid pro quo* test, the ruling holds that the university does not require any services from its scholarship athletes.<sup>80</sup>

Revenue Ruling 77-263, however, neither reflects the reality of contemporary intercollegiate athletics nor the terms of current athletic scholarship agreements. First, as previously discussed, a *quid pro quo* relationship does exist between the student-athlete and the university.<sup>81</sup> Second, while the IRS concluded that athletic scholarships are awarded by the university primarily to aid recipients in pursuing their studies, this contention seems to be clearly contradicted by the documented findings that reflect the "big business" environment of college sports.<sup>82</sup> Finally, the assumption that the university cannot terminate the scholarship agreement upon the student's unilateral decision to withdraw from the athletic program does not comply with the current NCAA rules.<sup>83</sup> Thus, the facts underlying the decision in Revenue Ruling 77-263 simply do not reflect reality.

It is important to note that while the IRS has yet to alter its position on the taxation of athletic scholarships, recent developments suggest that the IRS is responding to the changing nature of intercollegiate athletics. In 1991, in an effort to prevent universities from continuing to overstep the bounds of their tax-exempt status, the IRS informed The Ohio State University that "it must pay unrelated-business income tax on revenues received from advertising on its scoreboard."<sup>84</sup> In another recent decision, the IRS determined that multi-million dollar contributions by the sponsors of the Cotton and Hancock bowls, Mobil Corporation and John Hancock Mutual Life Insurance, respectively, to the nonprofit bowl organizing committees are to be considered advertising payments.<sup>85</sup> The IRS contended that the corporate monies received by the organizers of the two bowl games were not related to the committees' tax-

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 48.

<sup>81</sup> See Hoeflich, *supra* note 18, at 602; see also NCAA BYLAWS § 15.3.4.1(d) (1991-92). The university has the right to terminate scholarship benefits during the period of the award if a student voluntarily withdraws from his or her sport. *Id.*

<sup>82</sup> See *supra* notes 1 and 71 and accompanying text.

<sup>83</sup> See NCAA BYLAWS § 15.3.4.1(d) (1991-92).

<sup>84</sup> *The Internal Revenue Service, Which Has Shown Renewed Interest in the Business of College Sports, Is at It Again*, CHRON. HIGHER EDUC., Oct. 9, 1991, at A41.

<sup>85</sup> John Steinbreder, *Bowled Over; An IRS Ruling Worries Bowl Game Officials*, TIME, Dec. 16, 1991, at 20.

exempt status and must be taxed as unrelated business income.<sup>86</sup> While the ruling is limited solely to revenue received from Mobil Corporation and John Hancock Mutual Life Insurance, it may soon have a significant financial impact on other major intercollegiate sporting events.<sup>87</sup>

While recent actions taken by the IRS may represent change, the general position of the IRS regarding athletic scholarships still does not comport with the realities of intercollegiate athletics. The current IRS treatment of athletic scholarships not only fails to take into account the provisions of the NCAA bylaws, but also fails to comply with the spirit of section 117, which adheres to the belief that athletic scholarships are primarily for the educational advancement of the student-athlete.

## V. DUE PROCESS IN SCHOLARSHIP TERMINATION CASES

The *Rensing* court did not address the issue of whether due process protections must be accorded to student-athletes with athletic scholarships. Nevertheless, due process protection has been a concern when state universities have either prematurely terminated or failed to renew scholarships without fair hearings.<sup>88</sup> The Fourteenth Amendment ensures that no state shall deprive any person of property interest without due process of law.<sup>89</sup> Some courts and critics have argued that the contractual nature of athletic scholarships provides the student with an entitlement to educational and financial benefits.<sup>90</sup>

One case illustrating the need to accord athletic-scholarship students due process before denying the renewal of their benefits is *Conard v. University of Washington*.<sup>91</sup> In *Conard*, two varsity football players, Conard and Fudzie, sued the University of Washington for breach of contract. The breach was said to have resulted from the University's decision to deny scholarship renewal for misconduct.<sup>92</sup> While the trial court granted the defendant's motion for summary judgment, the Washington Court of Appeals found that "Fudzie's

---

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *Conard v. University of Wash.*, 814 P.2d 1242 (Wash. Ct. App. 1991), *aff'd in part and rev'd in part*, 834 P.2d 17 (Wash. 1992).

<sup>89</sup> U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." *Id.*

<sup>90</sup> See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The court stated, "[t]o have a property interest in a benefit . . . [h]e must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

<sup>91</sup> *Conard*, 814 P.2d at 1242.

<sup>92</sup> Fudzie and Conard both brought suit against the University and filed a separate action for contract interference against Don James, the head coach of the University's football team.

scholarship, issued under a representation that it would be renewed subject to certain conditions, provided him with a legitimate claim of entitlement that warrant[ed] the protection of due process before any deprivation of that claim of entitlement."<sup>93</sup> The court held that the University hearing regarding the nonrenewal of Fudzie's athletic scholarship benefits did not provide the student-athlete with minimum due process protection. The case was reversed and remanded to the University for an adequate hearing pursuant to procedures outlined by the court.<sup>94</sup>

On August 6, 1992, the Supreme Court of Washington reversed the Court of Appeals decision, holding in part that the plaintiffs did not have a protected property interest in the renewal of their athletic scholarships and thus were not entitled to due process protection.<sup>95</sup> In failing to uphold minimum due process safeguards for Fudzie, the Washington Supreme Court stated in its analysis that the duration and terms of the financial aid contract were "not sufficiently definite to establish a legitimate claim of entitlement to the renewal of [Fudzie's] athletic scholarship."<sup>96</sup> This decision simply reinforces the imbalance of power that exists between the student-athlete and the university. Despite the Court of Appeals' findings that the University issued the athletic scholarship under the representation that it would be "renewed subject to certain conditions" and that it was the University's practice to renew such scholarships for at least four years,<sup>97</sup> the Washington Supreme Court concluded that the University only promised to *consider* renewal of the benefits.<sup>98</sup>

The Washington Supreme Court's decision does not comport with contemporary intercollegiate athletics. High school athletes are often vigorously recruited with the promise and expectation that they will be offered an athletic scholarship for four years subject to several renewal conditions.<sup>99</sup> While the duration of an athletic scholarship agreement is in form limited to one year, the practices and rules associated with athletes' attendance and participation in university athletic programs reflect a longer term agreement. The aggressive recruiting tactics aimed at enticing student-athletes to attend a particular university and the NCAA provision severely restricting student-athletes from

---

<sup>93</sup> *Conard*, 814 P.2d at 1246.

<sup>94</sup> *Id.* at 1247. In addition, the Washington Court of Appeals affirmed the dismissal of Conard's complaint because his academic performance made him ineligible for scholarship renewal and he failed to request a hearing after being notified of the nonrenewal of his scholarship. *Id.* at 1245. The court also affirmed the trial court's dismissal of the claim against James. *Id.* at 1248.

<sup>95</sup> *Conard v. University of Wash.*, 834 P.2d 17, 22 (Wash. 1992).

<sup>96</sup> *Id.*

<sup>97</sup> *Conard*, 814 P.2d at 1246.

<sup>98</sup> *Conard*, 834 P.2d at 22.

<sup>99</sup> See NCAA BYLAWS § 15.3.5 (1991-92).



transferring to another institution strongly suggest that both parties intend to enter into a four-year agreement.<sup>100</sup> In light of these factors, it is evident that the Washington Court of Appeals arrived at the proper interpretation of the contract between Fudzie and the University by recognizing the reality of today's scholarship offers.

Until 1988, many critics asserted that student-athletes attending both state and private educational institutions should be afforded due process protection.<sup>101</sup> It was argued that "[b]oth public and private universities have surrendered to the NCAA their power to regulate college athletics and the NCAA has, in turn, adopted rules and regulations by means of a process in which public as well as private schools participate."<sup>102</sup> Once the NCAA rules were adopted by the membership, the rules applied with equal force to both public and private institutions. It was concluded that there appeared to be no distinction between NCAA action and state action.<sup>103</sup>

In *National Collegiate Athletic Association v. Tarkanian*,<sup>104</sup> however, the United States Supreme Court held that the suspension of the University of Nevada, Las Vegas (UNLV) head basketball coach Jerry Tarkanian, in compliance with NCAA rules and recommendations, did not transform the NCAA into a state actor. Tarkanian had filed suit against both the University and the NCAA under section 1983 of Title 42 of the United States Code for deprivation of liberty and property without due process of law. The coach contended that by adhering to NCAA rules the University transformed them into state rules, and consequently, the NCAA into a state actor.<sup>105</sup> While the Court conceded that "a state university without question is a state actor," it did not accept Tarkanian's position that the alleged conduct was attributable to the state of Nevada.<sup>106</sup> The Court concluded that UNLV's acceptance of NCAA regulations did not transform them into state rules because the University retained the power to withdraw from the NCAA and establish its own standards.<sup>107</sup> Furthermore, the Court stated that UNLV did not delegate power to the NCAA to take specific action against any University employee. Rather, the NCAA was deemed a private actor in an adversarial relationship with UNLV as a result of its investigation of the University's basketball program.<sup>108</sup>

---

<sup>100</sup> See NCAA BYLAWS § 14.6.1 (1991-92).

<sup>101</sup> See, e.g., Brian L. Porto, Note, *Balancing Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1157 (1986).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 488 U.S. 179 (1988).

<sup>105</sup> *Id.* at 194.

<sup>106</sup> *Id.* at 192-95.

<sup>107</sup> *Id.* at 194-95.

<sup>108</sup> *Id.* at 196.

The NCAA bylaws presently require a hearing, upon request, if the educational institution decides not to renew the student-athlete's scholarship.<sup>109</sup> The NCAA, however, requires only that the institution establish "reasonable procedures" for conducting such a hearing.<sup>110</sup> What constitutes "reasonable procedures" is a question left to the interpretation of the university.

Though the NCAA has yet to respond to the inequities of the current system, perhaps a partial solution can be found in the Court of Appeals decision in *Conard*. In *Conard*, the court stated that a student-athlete facing termination of scholarship benefits should, at a minimum, be provided with timely copies of any reports on which nonrenewal is based, an opportunity to respond and rebut the information, and a hearing conducted by an impartial tribunal.<sup>111</sup> Despite the courts' continued reluctance to grant student-athletes due process protection in nonrenewal cases, these procedural guidelines could still be adopted by the NCAA and apply to all student-athletes at both public and private institutions.

## VI. CONCLUSION

While the *Rensing* court conducted a one-sided examination of the athletic scholarship agreement and the relationship between the student-athlete and the university, its decision might be justified on public policy grounds. Some courts have expressed concern that recognizing an employee-employer relationship would expose educational institutions to an array of legal claims, including vicarious liability for torts committed in athletic competition.<sup>112</sup> Such liability could drain funds allocated to educational resources. Classifying the student-athlete as an employee of the school might result in scholarship benefits being taxed as income to the student-athlete, and may even require the educational institution to include the student-athletes in its payroll procedures by withholding federal and state income taxes and social security.<sup>113</sup> In addition, granting student-athletes status as employees may lead to demands for such benefits as group life and dental insurance.<sup>114</sup> It could also limit the legal

---

<sup>109</sup> NCAA BYLAWS § 15.3.5.1.1 (1991-92).

<sup>110</sup> *Id.*

<sup>111</sup> *Conard v. University of Wash.*, 814 P.2d 1242, 1246 (Wash. Ct. App. 1991), *aff'd in part and rev'd in part*, 834 P.2d 17 (Wash. 1992).

<sup>112</sup> *See, e.g., Townsend v. California*, 237 Cal. Rptr. 146 (Ct. App. 1987). This case involved a San Jose State University basketball player who struck Raymond Townsend, a UCLA player, during a game between the two teams. Because he was physically injured, Townsend sued the State of California, among others, under the theory of respondeat superior. The court ruled in favor of defendants.

<sup>113</sup> Rafferty, *supra* note 26, at 102.

<sup>114</sup> *Id.*

options available to those who suffer injuries while participating in their sport.<sup>115</sup> Some states have already attempted to resolve this problem. Through legislative action, several states have amended their labor codes to exclude student-athletes from the definition of an "employee."<sup>116</sup> This action was designed to prevent injured student-athletes from filing claims for worker's compensation benefits.

The *Rensing* case, however, illustrates the need for reform in the area of scholarship agreements. The current one-year scholarship agreement does not reflect the educational objectives promulgated by the NCAA and adopted by its members. The terms are overly restrictive and the student-athlete's bargaining power is severely limited. Furthermore, the one-year term transforms the athletic scholarship into a series of short-term contracts. These contracts provide an opportunity for coaches and other members of the university to exert pressure on student-athletes to improve their athletic performance by threatening nonrenewal of scholarship benefits.

In an effort to address some of the problems, the NCAA should consider requiring all athletic scholarships to be awarded for a minimum of four years<sup>117</sup> subject to three requirements: the athlete (1) Must maintain academic eligibility pursuant to present NCAA and university minimum standards; (2) Must not engage in serious misconduct warranting disciplinary penalty; and (3) Must participate in his or her sport. Those injured and unable to participate will not lose their scholarships as long as the other requirements are met. Also, athletic ability will not be used as a factor in determining premature scholarship termination. Finally, the NCAA should adopt explicit hearing procedures which guarantee the equivalent of due process protection for all student-athletes in cases that threaten the loss of scholarship benefits.

The proposed changes are designed to limit some of the potential abuses by the educational institution that exists under the current system. Also, in light of the present realities of intercollegiate athletics, such changes would be more reflective of a strong commitment by the institutions to provide an education to their student-athletes. Accompanying these measures, NCAA member institutions must continue to place more emphasis on academics in an effort to ensure that student-athletes do not simply *attend* college, but also *graduate*. Without further academic reform and changes to the current athletic scholarship

---

<sup>115</sup> Under workers' compensation laws, an injured student-athlete would be limited to workers' compensation benefits from the educational institution and prevented from pursuing other remedies based on tort liability. See 82 AM. JUR. 2D. *Workmen Compensation* § 20 (1992).

<sup>116</sup> See, e.g., CAL. LAB. CODE § 3352(k) (West 1989).

<sup>117</sup> The NCAA requires that student-athletes complete their seasons of participation in intercollegiate competition within five calendar years from the beginning of the semester or quarter in which they first registered. See NCAA BYLAWS § 14.2.1 (1991-92).

agreement, it is difficult to accept the *Rensing* court's assertion that the student-athlete is still "first and foremost a student."<sup>118</sup>

*Daniel Nestel*

---

<sup>118</sup> *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).